IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
SALES TAX REFERENCE NO.6 OF 1996
IN
REFERENCE APPLICATION NO.74 OF 1992

M/s. B.E.S.T. Undertaking ...Applicant.

V/s.

The State of Maharashtra ...Respondents.

Mr.P.C.Joshi for the Applicant.
Mrs. Madhubala Kajale for the Respondent.
Mr.R.A.Harpale, the Asstt.Commissioner of Sales Tax present.

CORAM: S.RADHAKRISHNAN &
J.H.BHATIA, JJ.
DATE : 7th July, 2005.
ORAL JUDGMENT: (Per J.H.Bhatia,J.)

1. On request of the Applicant, the Maharashtra Sales Tax Tribunal has made this Reference to this Court for adjudication on the following questions of law.

(a) "Whether on the facts and under the circumstances of the case and on a true and correct interpretation of the definition of the "dealer" u/s.2(11) of B.S.T.Act, 1959, the Tribunal was justified in holding that the applicant was dealer under the Act ? "

(b) "Whether on the facts and under the circumstances of the case and on a true and correct interpretation of the definition of the term "business" as given in section 2(5A) of the Bombay Sales tax Act, 1959 during the material period, the tribunal was justified in holding that the applicant was carrying on the business?"

(c)"Whether on the facts and under the circumstances of the case, the tribunal was justified in holding that it was for the applicant to prove that there was no profit motive in the activity conducted by it qua its rendering services of efficient transport

facility ?"

2. The facts leading to this Reference may be stated in brief. Thus:

The Applicant, the Undertaking established under the Bombay Municipal Corporation Act, has two fold activities; 1) generation and distribution of electricity for the Greater Bombay and 2) rendering transport facilities to the people in the city of Bombay. The Applicant was registered as a "dealer" under the Bombay Sales Tax Act under section 22(5A) and was assessed as such for the year 1981-82. The dispute is pertaining to the returns for the period from 1.4.83 to 31.3.84. The Applicant was assessed for Sales Tax by the Assistant Commissioner of Sales Tax (Assessment) as a "dealer". The Appeal preferred before the Deputy Commissioner came to be rejected mainly on the ground that the Applicant was registered under section 22(5A) of Bombay Sales Tax Act. The second Appeal before the Maharashtra Sales Tax Tribunal also came to be rejected. Before the Assistant Commissioner (Assessment), it was submitted on behalf of the Applicant that it was not a "dealer" qua its activity of providing transport facilities to the public. The Applicant never disputed that it is

a dealer as far as generation and distribution of electricity is concerned and it is contended that it is registered as a "dealer" under section 22(5A) only for the purpose of activity of generation and distribution of electricity. It is contended that under the provisions of Bombay Municipal Corporation Act, it is bound to provide transport facilities to the people within the municipal limits of Greater Bombay and it is not a profit making activity. And therefore, the Applicant is neither carrying on any business it nor is a "dealer" within the meaning of the Sales Tax Act. It is contended that for the purpose of providing transport facilities, it has purchased buses and other vehicles and after certain number of years when the buses become unserviceable, they are disposed of as the scrap. Neither the activity of providing transport services nor the sale of scrap arising out of that activity is undertaken for profit motive which was necessary at the relevant time to make an activity a business. Therefore, such sale of the scrap of unserviceable vehicles and other materials doesnot constitute a business.

3. Heard the learned counsels for both the parties. The learned counsels relied upon the several authorities in

support of their respective contentions. It is vehemently contended on behalf of the Applicant that the activity of providing transport facilities to the people is mandate of law for the Municipal Corporation and this activity is not carried on for the profit motive. It has to operate buses even where it may be making losses. The fare of the bus is also controlled so that travel by the BEST buses is affordable to the common people of the city. It is contended that during the relevant period, profit motive was necessary to make an activity, ' a business' within meaning of Section 2(5A) of Maharashtra Sales Tax Act and if any activity was carried on without any motive, it will not amount to business. On the other hand, on behalf of the Respondent it is contended that profit motive is irrelevant and it is well settled that when a regular business of transport is carried on, sale of scrap and unserviceable material is a part of their business and for that purpose, the Applicant has to be treated as a "dealer" and is assessable to the Sales Tax. It is also vehemently contended that the Applicant has voluntarily registered itself as a "dealer" under section 22(5A) and is, therefore, liable to assessment for Sales Tax for all the activities including transport and disposal of unserviceable and scrap material.

4. The word ’Business’ is defined in section 2(5A) of the Sales Tax Act as follows:

> **"business" includes any trade, commerce, or manufacture or any adventure or concern in the nature of trade, commerce or manufacture whether or not such trade, commerce, manufacture, adventure or concern is carried on with a motive to make gain or profit and whether or not any gain or profit accrues from such trade, commerce, manufacture, adventure or concern and any transaction in connection with, or incidental or ancillary to, the commencement or closure of such trade, commerce, manufacture, adventure or concern;**

It is material to note that words "whether or not such trade, commerce, manufacture, adventure or concern is carrried on with a motive to make gain or profit and whether or not any gain or profit accrues from such trade, commerce, manufacture, adventure or concern" were inserted in the original definition of business by way of amendment with effect from 16/8/85 by Maharashtra Amendment Act 9 of 1989. From this it

is clear that with effect from 16.8.85, profit motive became irrelevant for the purpose of definition of business under section 2(5A). However, before that date, profit motive was relevant and necessary for carrying on business.

5. The Applicant placed reliance upon the Supreme Court authority in **Government Medical Store v. State of Haryana 63 STR 198 And Government Medical Stores Depot v. Superintendent of Taxes Guwahati 60 STR 296** wherein the medical depots were held not to be "Dealers" because there was no profit motive as contemplated in Sales Tax Acts applicable to them. It is not disputed that the Applicant has to undertake activity of providing transport facilities for the people in the city as a mandate of Section 460A of Bombay Municipal Corporation Act. It also makes obligatory on the Applicant to run the transport activity economically which does not necessarily mean to make profit but to provide transport facilities to the people at affordable rates. The reliance is also placed on the **Commissioner of Income Tax v. Andhra Pradesh State Transport Corporation and separate of Corporation 159 ITR 1** wherein the Supreme Court held that the activity does not give rise to the profit motive. In view of the legal mandate to provide transport facilities and in view of the fact that the

Applicant is required to operate buses even on the routes where and at the times when services may not bring any profit and infact, may cause losses for such operations, it would be necessary for the Respondent to prove that the transport activity was carried on with profit motive to make the activity business within the definition of Section 2(5A) during the relevant period of 1983-84. After the amendment in Section 2(5A) with effect from 16/8/85, the profit motive becomes irrelevant but in this Reference, we are not concerned to any dispute after the amendment.

6. On behalf of the Respondent, reliance was placed upon **Member Board of Revenue, West Bengal v. Controller of Stores, Eastern Railway, Calcutta 74 STC 5, The District Controller of Stores Northern Railway, Jodhpur v. The Assistant Commercial Taxation Officer 37 STC 423**, in support of the contention that the transport activity and sale of even unclaimed goods, and unserviceable material and scrap amounts to business and is liable to be taxed under the Sales Tax Act. It may be material to note that in both the matters, the Southern and the Northern Railways were carrying on business of transportation of goods on commercial basis. In the case of Eastern Railway, it was found that the South

Eastern Railway was carrying on the goods and the activity was commercial. If the activity of selling goods which remained unclaimed was adjunctive to the principal activity of carriage of goods and was necessarily incidental or ancillary to its business of carrier of goods. In the case of **Northern Railway,** in view of the **provisions of Rajasthan Sales Tax Act**. The Supreme Court held that the Northern Railway which was carrying on business of transportation of goods was necessarily a dealer and a sale of unserviceable material and a scrap by the Northern Railway were assessable or liable to the Sales Tax. Both these authorities will not be applicable to the present case because the Eastern and the Northern Railways were carrying on commercial activity of transportation of goods for profit, while in the present case, according to the Applicant it is not carrying on any transportation of goods but provides only transport facilities to the people in the city without profit motive.

7. The learned counsel for the Respondent also placed reliance on Himachal Pradesh Road Transport Corporation v. Assessing Authority Simla, wherein in view of the provisions of Section 2C of Himachal Pradesh Sales Tax Act, it was held that sales of old spares and vehicles

which were unserviceable for State Road Transport Corporation but were useful to others amounted to business and the Corporation was a "dealer". It is material to note that profit motive was not a relevant factor for the business as per the definition of section 2AA of the Himachal Pradesh Sales Tax Act. This authority is not applicable to the facts in the present case because profit motive became irrelevant for business only from 16.8.85 but during the relevant period of 1983-84, the profit motive was a relevant factor.

8. The learned counsel for the Applicant strongly placed reliance upon the **State of Gujarat v. Raipur Manufacturing Company, Ltd. XIX Sales Tax Cases 1** wherein the Supreme Court observed as follows:

> "Whether a person carries on business in a particular commodity must depend upon the volume, frequency, continuity and regularity of transactions of purchase and sale in a class of goods and the transactions must ordinarily be entered into with a profit-motive."

Their Lordships also observed that

> "It is clear from these cases that to attribute an intention to carry on business of selling goods it is not sufficient that the assessee was carrying on business in some commodity and he disposes of for a price articles discarded, surplus or unserviceable. It was urged, however, on behalf of the State that where a dealer with a view to reduce the cost of production disposed of unserviceable articles used in

> the manufacture of goods and credits the price received in his accounts, he must be deemed to have a profit-motive, for it would be uneconomicalfor the business to store unserviceable articles and to survive as an economic unit. But the question is of intention to carry on business of selling any particular class of goods. Undoubtedly from the frequency, volume, continuity and regularity of transactions carried on with a profit-motive, an inference that it was intended to carry on business in the commodity may arise. But it does not arise merely because the price received by sale of discarded goods enters the accounts of the trader and may on an overall view enhance his total profit, or indirectly reduce the cost of production of goods in the business of selling in which he is engaged. An attempt to realize price by sale of surplus unserviceable or discarded goods does not necessarily lead to an inference that business is intended to be carried on in those goods, and the fact that unserviceable goods are sold and not stored so that badly needed space is available for the business of the assessee also does not lead to the inference that "business" is intended to be carried on in selling those goods".

9. From these observations, it would be clear that to find whether a particular person is carrying on business in a particular commodity, **volume , frequency, continuity** and **regularity of the transactions** of purchase and sell of such goods is necessary and ordinarily the transaction must be with profit motive, unless, the profit motive is made irrelevant by law. The Applicant is not actually carrying on business of purchase and sale of vehicles or the new spare parts for providing transport facilities to the people within the city. It has to operate fleet of buses and for that purpose, it has to purchase spare parts, tyres, tubes

and other materials necessary for maintenance of the buses. With the lapse of time, certain parts and vehicles become unserviceable and they have to dispose of the old and unserviceable buses about 10-15 years after purchase of the same. Therefore, it cannot be stated that the sale of such unserviceable vehicles, spares and other scrap materials is carried on with such frequency, continuity and regularity that it should amount to carrying on of a business in such material.

10. Word "dealer" is defined in Section 2(11) of the Sales Tax Act as follows:

"dealer" means any person who whether for commission, remuneration or otherwise carries on the business of buying or selling goods in the State, and includes (the Central) Government, or any State Government **which carries on such business,** and also any society, club or other association of persons which buys goods from or sells goods to, its members;"

Explanation:-For the purpose of this clause-

(i)each of the following persons and bodies who dispose of any goods (including goods) as unclaimed or confiscated or as unserviceable or as (scrap, surplus,

old, obsolete or discarded material or waste products) whether by auction or otherwise directly or through an agent for cash, or for deferred payment, or for any other valuable consideration, shall, notwithstanding anything contained in clause (5A) or any other provision of this Act, be deemed to be a dealer, to the extent of such disposals, namely-

(a) Port Trust:-
(b) Municipal Corporations, and Municipal Councils, and other local authorities;
(c) Railway administration as defined under the Indian Railways Act, 1890 (IX of 1890);
(d) Shipping, **(Transport)** and Construction Companies:
(e) Air transport companies and Airlines;
(f) (**********),
(g) Maharashtra State Road Transport Corporation constituted under the Road Transport Corporation Act, 1950 (LXIV of 1950);

From the definition of the "business" in section 2(5A) and the definition of the "dealer" in Section 2(11), it would be clear that the "dealer" is a person who carries on business and during the relevant period, it was necessary to be carried on with profit motive. In view

of the explanation, when the authorities mentioned in the explanation carry on business and disposed of any goods remaining unclaimed or confiscated or as unserviceable or as scrap surplus old obsolete or discarded material or waste product, it is deemed to carry on business in such material within the meaning of Section 2(5A). It is material to note that the explanation was inserted with effect from 16.8.85 by Maharashtra Amendment Act 24 of 1985. As per entry (d) shipping, **transport** and construction companies were included in the authorities of the Companies who would be deemed to be a "dealer" as per the said explanation. However, from entry "D", Air Transport was deleted and was deemed to have been deleted with effect from 16.8.85 itself by Maharashtra Amendment Act 30 of 1997. It means that the Transport Companies were never treated as the authorities or bodies to whom the explanation would be applicable. The word **"transport"** appears to have been deleted because the Transport Companies have to purchase vehicles to carry on business of transportation and for the maintenance of vehicles, such companies have to purchase spare parts, etc. and the scrap of unserviceable vehicles and materials are required to be disposed of after certain number of years. While carrying on business of transportation is their normal and ordinary business, the sale of scrap, unserviceable

material and vehicles is not their ordinary business. Therefore, to avoid difficulties to transport companies, the Legislature felt it necessary to delete the transport companies from the entry (d) of the said explanation. In the result, if such **transport** companies dispose of the scrap, unserviceable materials and vehicles, it does not amount to business and they are not supposed to be the dealers within the meaning of Section 2(11).

11. It is material to note that the Applicant is also a company having two different activities, i.e., i) generation and distribution of electricity and ii) providing transport facilities to the people. As such, for the second activity, it is a transport company. And therefore, in view of the definition of "dealer" read with said explanation in the light of above referred amendments, the Applicant is not a "dealer" qua sale and disposal of scrap, unserviceable material and the vehicles. If the Applicant is not given this benefit, it would amount to discrimination between the Applicant on the one hand and the private transport companies on the other hand. The Applicant which is providing transport facilities to the people in the city without profit motive cannot be discriminated against when the private transport companies are given benefit of

provisions of law discussed above. It could not be even intention of the legislature.

12. On behalf of the Revenue, it is contended that the Applicant had voluntarily registered itself as a "dealer" under section 22(5A) and therefore, it is liable to sales tax. As pointed out earlier, the Applicant contends that registration was only in respect of generation and distribution of electricity. Thus, there is a dispute about the purpose and the scope of registration. For the purpose of this Reference, registration under section 22(5A) is irrelevant and therefore, we refuse to express any opinion about the same.

13. For the reasons discussed above, it must be held that the Applicant was not carrying on business qua its transport activities during the relevant period and was not a "dealer" within the meaning of Section 2(11) of Bombay Sales Tax Act.

14. In the result, we answer questions (a), (b) and (c) in the negative, i.e., in favour of the Applicant and against the Respondent. The Reference is disposed of accordingly.

(S.RADHAKRISHNAN,J.)

(J.H.BHATIA, J.)